2000

Direct Import Buyers' Association v. K.S.L., Inc. : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

DIRECT IMPORT BUYERS' ASSOCIATION,

Plaintiff-Appellant,

vs.

Case No. 13966

K.S.L., INC.,

Defendant-Respondent.

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Stewart M. Hanson, Jr., District Judge

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STATEMENT OF THE CASE

This is an action for disparagement of quality of goods arising out of two newscasts by the defendant commenting editorially upon a product manufactured and marketed by the plaintiff.

DISPOSITION IN THE LOWER COURT

The trial court granted defendant's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the Summary Judgment in its favor.

STATEMENT OF FACTS

The Statement of Facts in Appellant's Brief is incomplete and wholly inadequate to acquaint the court with the essential factual background upon which this case must be decided. We, therefore, restate the facts.

In the Fall of 1973, the State of Utah, as well as the rest of the country, was confronted with a severe and somewhat unexpected energy shortage, particularly in the sale and availability of refined petroleum products. In that connection a variety of measures were under consideration both by the government and by private industry to cope with and meet the gasoline shortage, including reduced speed limits, closing of service stations on Sundays and holidays, conversion to daylight savings time on a year-round basis, and consideration to rationing of gasoline. At that time various means of introducing better gasoline mileage in the operation of automobiles were being widely discussed and debated. Contemporaneously there was also interest in the environmental effects of the waste products of gasoline engines on the atmosphere. (R. 39-42)

In this background, Lynn Packer, a reporter for defendant radio station, undertook to make a study and to do a series of newscasts on this subject. Two newscasts were directed specifically at plaintiff's products. (R. 39-42) For the convenience of the court, the full text of both newscasts is set forth here.

Broadcast of November 14, 1973

"The Utah man who invented 'Eccono-Jets' today said his device could cut the State's gasoline consumption a third if installed on all cars. Howard Rock also said his replacement carburetor idle screw fights pollution and increases power in addition to saving gas.

"Eccono-Jets are sold in several Utah stores for $5.95 a pair. The inventor said they cost 20 cents a pair to manufacture - but royalties, packaging, marketing, and profits drive the price up.

"Eccono-Jets replace the idle screws already on an engine's carburetor. The difference: A hole through the Eccono-Jet - admitting a stream of air - supposedly creates a better fuel mixture.

[Statement of Inventor, Howard Rock]

'Well the mileage, of course, will be better - on longer trips - the tests that we have, have proven that the needle will generally get ten percent improvement on gas mileage - and as high as 17-18 miles to the gallon on some of the larger cars driving on the highway.'

"Eccono-Jet advertising says the Utah product can add up to six miles per gallon. And the company has a stack of customer letters which supports its claims.

"But there are skeptics. A New Hampshire auto expert says the idea dates back to 1939. A. J. White said the device can slightly increase mileage by leaning the fuel mixture. But White said the leaner mixture created by the units he's seen could cause burned valves and the hole could admit dust into the engine.

"Inventor Rock says thirty thousand units in successful operation prove the skeptics wrong. He says he is now developing a new engine that will yield 60-70 miles per gallon. And to top that the Utahn says he's close to a cure for cancer and the common cold.

"A local auto executive said he personally thinks such devices are a waste of money. And Dr. Grant Winn of the Utah Air Conservation Committee said the Eccono-Jets would be unlawful if they alter - for the worse - a car's air pollution control equipment.

"In 1971, a California Government agency tested Eccono-Jets and found the unit's decreased carbon monoxide emissions but increased hydrocarbon and nitrogen oxides emissions." (R. 44-45)

Broadcast of December 31, 1973

"A Utah firm which sells what it says are economy carburetor needles has sold Nine Hundred Thousand Dollars' worth since October. A spokesman for Direct International Buyer's Association says his company has put 150 Thousand units into buyers' hands.

"Tony Kratz, speaking for the Utah company - says Eccono-Jets are now being sold in many major U.S. cities. The units replace a car's carburetor idle needles, and are supposed to increase gas economy up to six miles per gallon.

Last month KSL News sent a set to Motor Vehicle Research Laboratories in New Hampshire. In

his return letter, Director A. J. White said in his opinion that the jets do not improve mileage. White said, further, that the rules of the U.S. Clean Air Act prohibit disturbing a car's existing idle screws. And he said replacement idle jets could cause engine damage. A spokesman for Eccono-Jets said his product was being tested by the New Orleans Police Department, and the test was going 'very well.' But in New Orleans, Captain Herman Saacks today said he's noticed no gas mileage improvement with the jets installed in his personal police car.

"Tony Kratz with Eccono-Jets insists his product does work. Kratz says the company's 1974 Camero has gone from 8-1/2 to 14 miles per gallon with Eccono-Jets. As to their legality, Kratz said he's heard opinions both ways." (R. 46)

Examination of these reports, viewed in their entirety, reveals that they are not presented as a biased criticism of plaintiff's product. Rather, the stories are balanced, setting forth both the "pros" and the"cons" as to the relative merits of plaintiff's

product. The inventor of the device is specifically quoted as to the claims which were made for it. It will be observed that one-half or more of the total amount of each newscast quotes comment favorable to the plaintiff's product, and the other half quotes comment adverse to the plaintiff's product.

It will be further noted that at no place does the commentator express a personal opinion or view as to the relative merits of the plaintiff's product. He simply sets forth the views of proponents and opponents. Not a single statement in either newscast has been shown or can be shown to be untrue.

The gravamen of plaintiff's complaint appears to be that the newscasts did not contain all of the factual background from which the statements which were cited and quoted were distilled. It obviously would have been impossible in a short newscast to relate the details of all of the examinations, tests and research done by all of the persons whose opinions were cited. The simple purpose of the newscasts was to acquaint the public with the fact that there were conflicting views

as to the merit of the Eccono-Jets so that the listening public could make its own investigation and determination as to the value of the devices.

Following publication of these newscasts, plaintiff commenced this action against defendant. (R. 1-7) Upon the basis of the undisputed facts the trial court granted defendant's motion for summary judgment (R. 88-89) and this appeal followed. (R. 100)

ARGUMENT

PRELIMINARY STATEMENT

Although this case has been characterized by plaintiff's attorney as an action in defamation, it is more properly described as an action for disparagement of quality of goods. Although these two torts are very similar and the rules applicable to them are very much the same, there are some important differences. These are spelled out in Restatement of Torts, chapter 28, p. 323, as follows:

> "Introductory Note: Liability for disparagement of the property in or the quality of land, chattels or intangible things differs in several highly important particulars from the liability for the publication of matter which is defamatory to the personal

> reputation of another. In defamation, truth is a defense required to be proved by the publisher as defendant. In disparagement, the person whose property in goods or the quality of whose goods has been attacked must prove that the disparaging expression of opinion is incorrect. Again, in defamation, the publisher who seeks protection of a conditional privilege must prove the existence of the facts which create it. In disparagement, the absence of privilege must be proved by the person who seeks to recover the financial loss caused by the disparagement . . . . The action for disparagement . . . . cannot be used merely to vindicate one's title to or the quality of one's possessions." (Emphasis added.)

See also 1 Harper and James, The Law of Torts, pp. 479-481.

Perhaps the most significant difference, so far as the issues of this appeal are concerned, is that in an action for defamation, truth is an affirmative defense, and the defendant bears the burden of proof, whereas in an action for the disparagement of quality of goods, the falsity of a statement is one of the essential elements of the plaintiff's cause of action, and the plaintiff has the burden of proof. See Restatement of Torts, Sec. 651(c).

POINT I

THE STATEMENTS PUBLISHED BY DEFENDANT OF AND CONCERNING PLAINTIFF'S PRODUCT WERE TRUE AND THEREFORE NOT ACTIONABLE.

The rule appears to be well established in this country that truth is a complete defense to a civil action for defamation or for disparagement of quality of goods. The rule is succinctly stated in the Restatement of Torts, § 582, as follows:

> "The truth of a defamatory statement of fact is a complete defense to an action for defamation."

To the same effect, see 1 Harper and James, The Law of Torts, Sections 5.20 and 6.1; Prosser on Torts 4th Ed. 776, 797; 50 Am.Jur. 2d 676, 682, Libel and Slander, §§ 173, 179.

In the early case of State v. Burnham, 9 N.H. 34, 31 Am. Dec. 217, 221 (1837), the court said:

> "'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. * * *
>
> 'It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion--a legal right to make a publication--and the matter true, the end is justifiable, and that, in such case, must be sufficient.'"

This language was quoted with approval in Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209. See also Curtis Publishing Company v. Butts, 388 U.S. 130, 87 S.Ct.

1975. The rule has been recognized in this state. Williams v. Standard-Examiner Publishing Company, 83 Ut. 31, 27 P.2d 1.

As noted in our statement of facts, all of the statements published by defendant concerning plaintiff's product are shown to be true. As previously noted, the burden is upon the plaintiff to show the falsity of the statements. No effort has been made to do this. The record shows without dispute that each statement made by the reporter was based upon factual information in his file. Even if his sources were not accurate, no valid claim can be asserted that he did not state their positions correctly. This alone is a sufficient defense, and under the authorities above cited this alone warrants affirmance of the judgment below.

POINT II

THE STATEMENTS MADE BY DEFENDANT WERE FAIR COMMENT UPON A MATTER OF PUBLIC INTEREST AND THEREFORE PRIVILEGED.

It is well established that matters of general public interest are subject to fair comment by the news media and others, and even if some of the comments are

not entirely true, they are not actionable if not made maliciously. The social interest of the general public in having access to information and to the benefit of full and free discussion of issues of public interest outweighs any private interest of an individual to be free from adverse comment or criticism. Restatement of Torts, §§ 594, 598 and 606; Prosser on Torts, 4th Ed. 792.

As said in 1 Harper and James, The Law of Torts, § 5.28, p. 456:

> "The principle of 'fair comment' affords legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact. This principle is of the greatest importance to a democratic society which enjoys the tradition of free speech."

See also 50 Am. Jur. 2d 807-808, Libel and Slander, § 290:

> "It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally, and such comments and criticisms are not actionable, however severe in their terms, unless they are made maliciously."

See also op. cit., p. 830, § 308.

A prime example of the application of this rule is the decision of this court in Williams v. Standard-Examiner Publishing Company, 83 Ut. 31, 27 P.2d 1. In that case the defendant publishing company had criticized the plaintiff city commissioner in the most scathing terms. He had been charged with criminal negligence, manslaughter, criminal carelessness, lying, incompetency, deliberate pollution of the water supply, ignorance, defiance of valid orders and of being guilty of crimes more reprehensible than those for which better men were in prison. All of these charges arose out of a conclusion by the publisher, based upon apparently valid evidence, that a typhoid epidemic resulted from permitting contaminated waters to be introduced into the municipal water supply. Subsequent investigation determined that the waters probably were not the cause of the typhoid epidemic. Plaintiff commenced an action for defamation and recovered a judgment in the trial court which was reversed on appeal. This court said:

> "That appellant and the residents of Ogden City had a common interest in the threatened typhoid epidemic, in its source, and in the prevention of its spread, is not open to question. It is equally clear that

> appellant and the inhabitants of Ogden had a common interest in fixing, if possible, the responsibility for the outbreak of the disease, and in taking such steps as might be necessary to check its spread and prevent its recurrence. Information concerning the manner in which plaintiff as city commissioner in charge of the waterworks department of the city had been and was handling the city culinary water supply was likewise a matter of common interest to appellant and the citizens of Ogden. 36 C.J. 1284, §291, and cases there cited; People v. Glassman, 12 Utah, 238, 42 P. 956. Appellant by informing its readers upon such matters was performing a duty which falls within that class mentioned in the rules as 'of a moral or social character of imperfect obligation.'"

This court further held that the comments of the defendant newspaper were made in good faith without actual malice, with reasonable or probable grounds for believing them to be true, and that the comments were reasonable and fair in light of the facts and circumstances that existed or appeared to exist at the time of the publication. This court also quoted with approval from Newell on Slander and Libel 4th Ed., as follows:

> "Criticism differs from defamation in the following particulars.

> '1. Criticism deals only with such things as invite public attention or call for public comment. . . .
>
> '2. It never attacks the individual, but only his work. . . . In every case the attack is on a man's acts, or on some thing, and not upon the man himself. . . .
>
> 'Every person has a right to publish such fair and candid criticism, although the author may suffer loss from it. . . . Liberty of criticism must be allowed or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. A publication, therefore, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning. . . is not actionable. . . .
>
> ". . . A fair and bona fide comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication. . . .'"

The court also quoted with approval from 36 C.J., as follows:

> §285: "'. . . The right of comment is not restricted to a restatement of the naked facts. As a general rule it may include the right to draw inferences or express opinions from facts established. The soundness of the inferences or opinions is immaterial whether they are right or wrong, provided they are made in good faith and based upon the truth. . . .'"
>
> §287: "'. . . The criticism may be severe, harsh, bitter, or sarcastic. Mere exaggeration, ridicule, or even gross exaggeration

> does not of itself make the comment or criticism so unfair as to destroy the immunity. It is generally held that such comment may be caustic or severe if the facts warrant it.'"

And finally the court said:

> ". . . To say that the writer and publisher of the articles here in question was motivated by a desire to injure plaintiff rather than for the purpose of promoting the public weal would be a mere guess. Upon this record a finding that the article declared on was published with malice in fact is without any substantial evidence to support it. There is an abundance of evidence tending to show that the articles were published with a proper motive.
>
> "We are of the opinion that the court below was in error in refusing to grant the motion for a nonsuit and the motion for a directed verdict." (Emphasis added.)

It will be noted that the criticism published by the plaintiff in the Williams case was far more severe than the criticism published of the plaintiff's product here. Likewise, there was less basis of truth in the statements published by the defendant in that case than in the broadcast by the defendant here.

A more recent case involving publication of defamatory statements concerning a political candidate was Demman v. Star Broadcasting Company, 28 Utah 2d 50, 497 P.2d 1378. In that case the defendant radio station

in a talk show permitted statements to be braodcast reflecting upon the plaintiff's integrity, his business and professional competence, and his personal morals. This court affirmed a summary judgment granted in favor of the defendant broadcasting company on the grounds that the publication was privileged and not shown to have been malicious.

It is clear that the privilege of fair comment and criticism is not limited to public officials, candidates for public office, celebrities etc., but extends to all matters of public interest and concern, anything submitted to the public for approval such as merchandise, advertisements etc. 50 Am. Jur.2d, Libel and Slander §291; Prosser, Law of Torts, 4th Ed. 828.

In the case of All Diet Foods Distributors, Inc., v. Time, Inc., 56 Misc.2d 821, 290 N.Y.S.2d 445, defendant published a book showing a picture of plaintiff's store front captioned with the words, "Food Fads and Frauds." A libel action by the plaintiff against the defendant was dismissed, the court saying:

> "Certainly the subject matter of the article under review if of considerable public interest and it cannot be said of the

> conduct of the defendant with respect to motivation that the complaint meets the required standards. Certainly the intent here was not merely to injure through falsehood; rather the motivation was the protection of the public in the disclosure of a highly important matter affecting the public interest.
>
> "The motion is granted and the complaint is dismissed."

In the case of Steak Bit of Westbury, Inc., v. Newsday, Inc., 70 Misc.2d 437, 334 N.Y.S.2d 325, defendant published an article critical of food served at plaintiff's restaurant. Plaintiff commenced an action in libel against the defendant, and summary judgment was granted in favor of the defendant, the court saying:

> "Even assuming that the article had defamatory content, Lollypop, as a public facility, must show more than a published false statement to recover. It must overcome the qualified privilege of fair comment which protects criticism of institutions serving the public. . . .
>
> "Under recent United State Supreme Court pronouncements, comment upon the activities of a public figure or private individual's involvement in an event of public interest is constitutionally protected under the First Amendment's guaranty of free speech and a free press. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). Certainly, a restaurant which serves food to the general public is involved in an enterprise

> of public interest. . . . Preservation of freedom to write about restaurants, to criticize or compliment, is another form of safeguard, and is a vital channel through which the public's right to know is protected. . . .
>
> "Therefore, commentaries in a newspaper about a public restaurant's service and food even if false are immune from defamation liability unless a showing is made that the statements were motivated by malice or made with wanton disregard. . . . Unless plaintiff can show by 'clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not', Rosenbloom v. Metromedia, Inc., supra, 403 U.S. at 52, 91 S.Ct. at 1824, an action for libel will not lie. . . .
>
> "Since Lollypop does not cite any specific grudge or malice that defendants may have had in publishing the article, the presence or absence of malice or reckless disregard must be determined from the context of the article, its tone and quality, the manner of its preparation, and the content of the specific statements made. . . .
>
> "To defeat defendants' motion for summary judgment, Lollypop must do more than rely upon conclusory allegations in the complaint. It must show convincing evidentiary facts of actual malice. . . ."

In Bon Air Hotel, Inc. v. Time, Inc., 295 F.S. 704, affd. 426 F.2d 862, a magazine article critical of plaintiff's hotel was held to be privileged, even though some of the statements were not one hundred percent true.

To the same effect see All Diet Foods Distributors, Inc., v. Time, Inc., 290 N.Y.S.2d 445; Gospel Spreading Church v. Johnson Publishing Co., (D.C. App.), 454 F.2d 1050; and Curtis Publishing Co., v. Butts, 87 S.Ct. 1975, 388 U.S. 130.

Plaintiff relies principally upon three cases: Utah Farm Bureau Fed. v. Natl Farmers Union Sv. Corp., (10 Cir.), 198 F.2d 20; Carey v. Hearst Publications, 19 Wash.2d 655, 143 P.2d 857; and Berry v. Moench, 8 Ut.2d 191, 331 P.2d 814. All of these cases were decided long before N.Y. Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, and its progeny (more fully discussed under our next point) and to the extent that they are inconsistent therewith, they are completely invalid. Apart from that, they are all significantly different from the case at bar. In both U. Farm Bureau and Carey the words published were libelous per se. In Berry, the action was not really in defamation, but for breach of plaintiff's privilege against revealing confidential information obtained in the doctor-patient relationship. Nor did the case involve a matter of general or public interest.

The facts of all these cases are so different from those in the case at bar as to make them of no persuasive value.

POINT III

THE WORDS PUBLISHED BY DEFENDANT ARE PROTECTED FROM CIVIL LIABILITY BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the case of New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, the Supreme Court of the United States determined that the First Amendment guarantees of freedom of speech and of the press, protect even some untrue statements from civil liability. Said the court:

> "The general proposition that freedom of expression upon public questions if secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'. . . .
>
> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . .

> "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth--whether administered by judges, juries, or administrative officials--and especially one that puts the burden of proving truth on the speaker. . . .
>
> "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'. . . .
>
> "As Madison said, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.'"

This decision was followed and expanded in subsequent cases. See Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209. In Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, the court said:

> ". . . The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'. . ."
>
> * * * *
>
> "Our touchstones are that acceptable limitations must neither affect 'the impartial distribution of news' and ideas, Associated Press v. National Labor Relations Board, supra, 301 U.S., at 133, 57 S.Ct., at 656, nor because of their history or impact constitute a special burden on the press, Grosjean v. American Press Co., Inc., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, nor deprive our free society of the

stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish."

In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, the court said:

". . . Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. . . ."

See also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811. In Gertz v. Robert Welch, Inc., _____ U.S. ____, 94 S.Ct. 2997, the court said:

"Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press.' 4 Elliot's Debates (1876), p.571. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious

> statements does not accord adequate protection to First Amendment liberties. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Under these Supreme Court decisions what was once a common law qualified privilege has now been determined to be a constitutionally guaranteed right. See Prosser on Torts 4th Ed., pp. 819, 822-823, ch. 21, § 118.

POINT IV

SUMMARY JUDGMENT WAS PROPER IN THIS CASE.

We recognize that summary judgment is a drastic remedy, to be sparingly used. However, where, as here, there is no real dispute as to the facts, and the issues are essentially legal, summary judgment is appropriate, sparing both the parties and the court unnecessary and burdensome time and expense. See Holland v. Columbia Iron Min. Co., 4 Ut.2d 303, 293 P.2d 700; Dupler v. Yates, 10 Ut.2d 251, 351 P.2d 624; Continental Bank & Trust Co. v. Cunningham, 10 Ut.2d 329, 353 P.2d 168; Henry v. Washiki Club, Inc., 11 Ut.2d 138, 355 P.2d 973, 6 Moore's Fed. Prac., § 56 04 p. 2028.

The remedy of summary judgment has been found by many courts to be appropriate in defamation suits analogous to the case at bar.

In the case of Steak Bit of Westbury, Inc. v. Newsday, Inc., 70 Misc.2d 437, 334 N.Y.S.2d 325, the court said:

> "In a motion for summary judgment, the threshold test of showing malice or reckless disregard is vital to the enforcement of the consitutional privilege of fair comment. Without the demonstrated presence of these elements, the publisher should not be burdened with a full trial and its consequent inhibitory effect upon future exercise of free speech and press. . . ." (Empahsis added.)

In holding that summary judgment was appropriate in the Bon Air case the court said:

> "Actual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict. The functions of the trial court judge and the jury have been explained as follows:
>
> > 'In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. . . . Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant. * * * '

"Thus it is clear that, where a publication is protected by the New York Times immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case. Judge Tuttle in Time, Inc. v. McLaney, supra 406 F.2d at 566, recognized the appropriateness of summary judgment:

> 'The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceddings, which, if not really warranted, would themselves offend the principles enunciated in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, because of the chilling effect of such litigation.'

"The District of Columbia Circuit placed a similar emphasis on the role of summary judgments in defamation actions:

> 'In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. * * * Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from

> the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues * * * will become less uninhibited, less robust, and less wide-open, for self censorship affecting the whole public is 'hardly less virulent for being privately administered.' Smith v. People of State of California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959).'
>
> "Washington Post Co. v. Keogh, 125 U.S. App. D.C. 32, 365 F.2d 965, 968 (1966)."

And in concluding the court said:

> "Freedom of expression must have a necessary breathing space if it is to survive. If these statements raise factual issues of actual malice, that necessary breathing space becomes almost meaningless. As has been noted, actual malice is a constitutional issue to be determined initially by the trial judge on motion for summary judgment. We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false."

The case of Cervantes v. Time, Inc., (8th Cir.) 464 F.2d 986, is of particular interest because there, as here, summary judgment was entered in favor of the defendant, notwithstanding the fact that the newsman had claimed a privilege of nondisclosure

of his information sources. The plaintiff had sought an order compelling disclosure, and the summary judgment was granted without requiring disclosure. The following excerpts from the opinion of the court are pertinent:

> "The District Court . . . did not reach the merits of the motion to compel. However, on the basis of a well-developed record consisting of affidavits, depositions, and other documentary evidence, it entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard for truth or falsity. . . .
>
> * * * *
>
> "Central to the mayor's appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources. . . .
>
> * * * *
>
> ". . . Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the identity of Life's news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, viz., that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that

either defendant acted with knowing or reckless disregard of the truth. . . .

"'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.'. . ."

* * *

". . . The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can arise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice.

"But such is not this case. As the opinion of the District Court makes clear, the record contains substantial evidence indicating that it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which the article was written and published. . . .

". . . Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of very careful verification efforts, that is, they were published in good faith without regard to the identity of

> the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources. Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment. The judgment of the District Court must therefore be affirmed."

CONCLUSION

Basic to the fundamental freedoms enjoyed by the citizens of this state and nation are the freedom of speech and freedom of the press. These guarantee "uninhibited, robust and wide-open" debate on issues of public interest and concern. Those who appeal to the public market for patronage must be subjected the scrutiny of adverse comment and criticism. The media should not be hampered in the exercise of their constitutionally guaranteed freedoms by fear of litigation which, even though not meritorious may be ruinously expensive to defend, particularly if there is full-scale trial of every case. Where as here, there is no showing of falsity, and no showing of malice, and where the publication amounts to nothing more than a fair comment

upon a matter of public interest, summary judgment should be granted as was done in this case. We respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing respondent's brief was served on counsel for the appellant, Kenneth M. Hisatake, 250 East 300 South Broadway Plaza, Suite 100, Salt Lake City, Utah 84111, by mailing a copy thereof, postage prepaid, on the _____ day of May, 1975.

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